

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
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In the Matter of

Application of SBC Communications, Inc. )  
Pursuant to Section 271 of the )  
Telecommunications Act of 1996 )  
To Provide In-Region, InterLATA Services )  
in Arkansas and Missouri )

CC Docket No. 01-194

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## SUMMARY

NuVox submits these comments in opposition to the Missouri portion of SBC's Section 271 Application for Arkansas and Missouri because SBC has failed to satisfy the Competitive Checklist in Missouri in at least one critical area .

As explained herein, **in Missouri SBC fails to provide a number of critical UNEs at prices based on TELRIC, as required under Checklist Item 2.** The "M2A" include rates for DS3 and DS1 entrance facilities, multiplexing, digital cross connect systems and SS7 cross connects and other critical UNEs that are patently excessive, not based on TELRIC, and have been allowed to be offered at non-cost-based "interim" rates for an unreasonably long period of time. For example, monthly recurring charges for DS1 entrance facilities are more than two times the rate for the same facility made available by SBC in its Texas T2A. Nonrecurring charges for the same facility are six to thirteen times higher in the M2A than they are in the T2A. Moreover, *SWBT steadfastly has refused to use its T2A rates as interim rates in Missouri, pending the adoption of permanent cost-based rates.*

Instead, SBC chooses to rely on a significant number of rates for critical UNEs established by the Missouri PSC ("Mo PSC") in an arbitration proceeding without any on-the-merits determination that the rates proposed by SBC are based on TELRIC or any reasonably related costing methodology. *The Mo PSC has opened a docket to establish permanent rates, but the current state of affairs in Missouri is that SBC does not make a number of critical UNEs available at cost-based rates – and it hasn't for more than five years.*

SBC's Missouri DS1 loop UNE rates are also excessive and highly suspect in terms of TELRIC compliance as reflected by the fact that the M2A's DS1 loop rates exceed SBC's Arkansas and Kansas rates by as much as 40%.

Promises of future performance are not sufficient. Competition has been stymied in Missouri by UNE prices that are up to thirteen times higher than UNE prices offered by SBC in its Texas T2A. Moreover, SBC has anticompetitively kept its competitors' costs high by refusing to import – at least as an interim measure – the Texas rates which the FCC already has found to be compliant with the checklist standard.

NuVox respectfully urges the Commission to deny SBC's Missouri Application. SBC should not be allowed to move forward into the interLATA market in Missouri until it meets its *legal obligation* to make available to competitors UNEs at cost-based rates.

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To Provide In-Region, InterLATA Services	)	
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**COMMENTS OF NUVOX, INC.**

NuVox, Inc.<sup>1</sup> (“NuVox”), by and through its attorneys, hereby submits these comments in response to the Commission’s *Public Notice* in the above-captioned proceeding.<sup>2</sup> The *Public Notice* invites interested parties to comment on the Application of SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc., d/b/a Southwestern Bell Long Distance Company (“SBC” or “SWBT”) to provide in-region interLATA services in the States of Arkansas and Missouri, pursuant to Section 271 of the Communications Act of 1934 , as amended.<sup>3</sup>

NuVox is a facilities-based integrated communications provider and competitive local exchange carrier with operations in 30 markets in 13 states throughout the Southeast and Midwest. NuVox offers a wide range of voice, data, internet and internet-related services

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<sup>1</sup> NuVox was formerly known as Gabriel Communications, Inc. NuVox operates in Missouri through its wholly-owned subsidiary, NuVox Communications of Missouri, Inc.

<sup>2</sup> *Public Notice*, Comments Requested on the Application by SBC Communications Inc. for Authorization under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the States of Arkansas and Missouri, CC Docket No. 01-194 (August 20, 2001).

<sup>3</sup> Pub. L. No. 104-104, 110 Stat. 56 (1996), *codified* at U.S.C. § 151 *et seq.* (“the Act”).

primarily to small and medium-sized business customers. NuVox provides its own dial-tone to most of its customer base from digital switches deployed throughout its operating region. NuVox has made a substantial investment in collocations in incumbent LEC central offices, but is dependent upon incumbent LEC loop and transport facilities to connect customers to its switching platform.

**I. SBC'S MISSOURI APPLICATION SHOULD BE DENIED FOR FAILURE TO COMPLY WITH CERTAIN ITEMS OF THE "COMPETITIVE CHECKLIST"**

**A. SBC's Missouri Application Does Not Comply With The "Is Providing" Standard**

Section 271 of the Act<sup>4</sup> requires a showing that the Applicant is providing and has fully implemented each item of the Competitive Checklist.<sup>5</sup> To satisfy the requirement that it "is providing" each item of the Checklist, the Applicant must demonstrate not only that it is under a "concrete and specific legal obligation" to furnish the item (*e.g.*, pursuant to one or more interconnection agreements), but also must demonstrate that it "is presently ready to furnish each item in the quantities that competitors may reasonably demand and at an acceptable level of quality."<sup>6</sup> To qualify as having fully implemented the Checklist, the Applicant must show that it has satisfied each of the Checklist obligations at the time of its filing – promises of future

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<sup>4</sup> 47 U.S.C. § 271.

<sup>5</sup> 47 U.S.C. §§ 271(c)(2)(A), (c)(2)(B), and (d)(3)(A)(i).

<sup>6</sup> Application of Ameritech Michigan Pursuant to Section 271 to Provide In-Region, InterLATA Services in Michigan, *Memorandum Opinion and Order*, 13 FCC Rcd. 20543, ¶ 110 (1997) (*Ameritech Michigan Order*).

compliance do not suffice.<sup>7</sup> As demonstrated below, SBC's Missouri Application fails to meet this standard with respect to the critical area of UNE pricing.

**B. Access to Unbundled Network Elements – SBC Fails to Provide A Number of Critical Unbundled Network Elements At Prices Based on Total Element Long Run Incremental Cost**

As was the case with SBC's Texas and Kansas/Oklahoma Section 271 filings, a model interconnection agreement is a key element of SBC's affirmative case regarding compliance with the items of the Competitive Checklist. The Missouri version of this model interconnection agreement is known as the "M2A". However, the M2A is deficient for purposes of Section 271 compliance due to the fact that its prices for a number of important unbundled network elements ("UNEs") are patently excessive, are not based on the total long-run incremental cost ("TELRIC") pricing methodology and have been allowed to remain in effect on an interim, non-cost basis for an unreasonably long period of time.

NuVox raised similar concerns regarding prices for these UNEs in its opposition comments to SBC's original Missouri Application.<sup>8</sup> While SBC very recently made limited revisions to certain UNE prices in an amendment to the M2A as a prelude to filing this Missouri Application, it failed to make any reductions to the prices of the UNEs addressed in NuVox's April 24 Comments.

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<sup>7</sup> *Id.*, ¶¶ 55, 179.

<sup>8</sup> *See, In the Matter of the Application of SBC Communications, Inc., Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services in Missouri*, CC Docket No. 01-88, Comments of NuVox, Inc., (filed April 24, 2001). ("NuVox April 24 Comments").

Some of the UNEs bearing the burden of these non-cost based rates include facilities that are particularly important to competitive carriers, including DS3 and DS1 entrance facilities, multiplexing, digital cross connect systems and SS7 cross connects. Rates for all of these (and for other) UNEs are patently excessive in comparison to SBC's Texas UNE rates, and in comparison to SBC's Arkansas and Kansas UNE rates.<sup>9</sup> Comparisons of M2A versus Texas and Arkansas/Kansas rates for some of these key UNEs are provided below:

- The monthly recurring charge ("MRC") for DS3 entrance facilities *r* in the M2A is *six times* the corresponding Texas rate contained in the T2A, and *four to five times* SBC's comparable Arkansas/Kansas rates, depending on the density zone.<sup>10</sup>
- Non-recurring charges ("NRCs") for DS3 entrance facilities in the M2A are also significantly higher than the comparable Texas and Arkansas/Kansas rates.<sup>11</sup>

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<sup>9</sup> The Commission has encouraged states lacking extensive resources "to take advantage of the efforts devoted by New York and Texas in establishing TELRIC-compliant prices, by relying where appropriate on the existing work product of those states. *Joint Application of SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc., d/b/a Southwestern Bell Long Distance, Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Kansas and Oklahoma*, Memorandum Opinion and Order, FCC 01-29, CC Docket No. 00-217, n. 244 (rel. Jan. 22, 2001) (*SWBT Kansas/Oklahoma Order*). Since Texas, Arkansas, Kansas and Missouri are all SWBT region states, Texas, Arkansas and Kansas provides reasonable analogues for UNE price comparisons with Missouri. SBC's Arkansas and Kansas UNE rates are now identical, and use of those rates for comparison purposes is particularly relevant in the context of a joint Application covering both Arkansas and Missouri.

<sup>10</sup> The M2A's MRC for DS3 entrance facilities (which is the same across all density zones) is \$1,884.49, compared to an urban zone Texas rate of \$286.29. Even the rural density zone Texas MRC is only \$458.44, or approximately 25% of the averaged M2A charge. SBC's Arkansas/Kansas rates are \$362.87 in the urban zone and \$458.44 in the suburban and rural zones.

<sup>11</sup> These NRCs are \$477.75 (initial, per order)/\$372.00 (additional per order) in the M2A, versus \$395.59/\$175.57 in Texas, and the Arkansas/Kansas rates are even lower -- \$260.45/107.45.



- The MRC for DS1 entrance facilities in the M2A is *more than two times* the level for the same facility in Texas, Arkansas and Kansas,<sup>12</sup> while the NRCs in the M2A are *six to thirteen times* the T2A prices and *three to five times* the Arkansas/Kansas rates.<sup>13</sup>
- The MRC for Voice Grade to DS1 Multiplexing in the M2A is *more than two times* the charge in the T2A and 50% greater than SBC's Arkansas/Kansas prices,<sup>14</sup> while the NRCs in the M2A are *two to three times higher* than the comparable Texas and Arkansas/Kansas prices.<sup>15</sup>
- The MRC for DS1 to DS3 Multiplexing in the M2A is *more than two times* the Texas and Arkansas/Kansas rates,<sup>16</sup> while the NRCs in the M2A are in the range of *30 to 50% higher* than the Texas and Arkansas/Kansas charges.<sup>17</sup>
- MRCs for SS7 Link Cross Connects are *approximately 60% to 75% higher* in the M2A than in Texas, Arkansas and Kansas<sup>18</sup> while the NRCs are *two to three times higher* under the M2A.<sup>19</sup>

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<sup>12</sup> The M2A's MRC for DS1 entrance facilities (same rate across all density zones) is \$162.30, while the comparable Texas and Arkansas/Kansas MRCs vary in a tight range of approximately \$75 to \$77 depending on the density zone.

<sup>13</sup> The M2A's NRCs for DS1 entrance facilities are \$471.00 (initial, per order)/\$342 (additional, per order), while the corresponding Texas NRCs are \$73.25/\$26.28, and the comparable Arkansas/Kansas rates are \$165.86/\$65.78.

<sup>14</sup> The M2A MRC for VG to DS1 multiplexing is \$180.00 versus \$81.15 in Texas and \$119.03 for Arkansas/Kansas.

<sup>15</sup> The M2A's NRCs are \$195.00 (initial, per order)/\$120.75 (additional, per order), versus \$96.84/\$48.51 in the T2A. The Arkansas/Kansas prices are identical to the T2A.

<sup>16</sup> The M2A MRC for DS1 to DS3 multiplexing is \$815.00 versus \$365.11 in Texas and \$359.53 for Arkansas/Kansas.

<sup>17</sup> The M2A NRCs are \$1,029.00 (initial, per order)/\$609.75 (additional, per order) versus \$777.51/\$439.79 under the T2A. Arkansas/Kansas prices are the same as those in the T2A.

<sup>18</sup> The MRCs are: STP to Collocation Cage – DSO: Missouri - \$74.20, Texas - \$42.58, Arkansas/Kansas - \$47.33; STP to Collocation Cage DS1: Missouri - \$53.65, Texas - \$30.89, Arkansas/Kansas - \$34.13.

<sup>19</sup> The NRCs are: STP to Collocation Cage – DSO: Missouri - \$224.85/\$151.84, Texas - \$67.24/\$64.55, Arkansas/Kansas - \$75.39/\$64.55; STP to Collocation Cage DS1: Missouri - \$192.75/\$130.84, Texas - \$75.12/\$72.46, Arkansas/Kansas - \$75.12/\$72.46.

Excessive rates such as these for essential UNEs artificially inflate competitive carriers' costs and impede development of a fully competitive telecommunications market.

The M2A also contains excessive prices for the DS1 loop, which is a critical component of combined voice and data offerings, which NuVox and other CLECs market to small and medium-sized business customers. SBC's Missouri DS1 loop MRCs exceed Arkansas/Kansas rates by as much as 40%, and exceed Texas prices by 15-20%.<sup>20</sup> There is no apparent basis for Missouri DS1 loop rates to exceed its neighboring state rates to such an extent. The result of SBC's excessive DS1 loop pricing in Missouri is to inflate artificially the cost of competitive alternatives to SBC's broadband offerings and thus to hinder vigorous broadband competition.

The reason the M2A contains these excessive UNE rates is threefold:

- (a) These prices are non-cost based, were approved on an "interim basis" by the Missouri Public Service Commission ("Mo PSC") in a December 1997 arbitration decision, and have been allowed to remain in effect on an "interim basis" since that time;<sup>21</sup> and,
- (b) SBC has steadfastly resisted the position put forward by competitive carriers that Texas prices or Arkansas/Kansas prices be substituted for these UNEs on an interim basis pending Mo PSC determination of Missouri TELRIC prices; and,
- (c) The Mo PSC inexplicably refrained from requiring SBC to substitute Texas or Arkansas/Kansas TELRIC prices on an interim basis as a condition of supporting this Application.

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<sup>20</sup> The M2A's DS1 loop MRCs range from \$91.06 to \$95.45 in the urban and suburban zones; corresponding Arkansas/Kansas MRCs are \$64.78 and \$70.26. The T2A's DS1 loop MRCs are in close range, between \$75 and \$77.

<sup>21</sup> *In the Matter of AT&T Communications of the Southwest, Inc.'s Petition for Second Compulsory Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Southwestern Bell Telephone Company*, Mo PSC Case No. TO-98-115, Report and Order, (December 23, 1997) (*TO-98-115 Decision*).

The Mo PSC established these UNE rates in the second round of arbitration proceedings between SWBT and AT&T in its Case No. TO-98-115.<sup>22</sup> In that decision, the Mo PSC set approximately 135 UNE prices on an interim, non-TELRIC basis, including the entrance facility, multiplexing, digital cross connect and SS7 link cross connect rates identified above, plus a number of other UNEs.<sup>23</sup> The Mo PSC gave initial indications that it intended to move relatively quickly to determine Missouri TELRIC-based prices for these UNEs,<sup>24</sup> but to date it has yet to render a substantive decision.<sup>25</sup> As a result, these non-cost based, anticompetitive UNE rates have been in effect for nearly four years.<sup>26</sup>

Checklist Item 2 requires a demonstration by the Applicant that it is providing nondiscriminatory access to network elements consistent with Sections 251(c)(3) and 252(d)(1)

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<sup>22</sup> *Id.* The UNEs for which the Mo PSC set non-cost based interim prices in this decision are hereinafter referred to as the “TO-98-115 UNEs”.

<sup>23</sup> Switch-based feature activation UNEs, were set at zero on an interim basis. Since NuVox deploys its own switching platform, it makes very limited use of SBC’s switching services and features.

<sup>24</sup> In its December 23, 1997 decision, the Mo PSC initially directed its Arbitration Advisory Staff to commence an investigation within two weeks – by January 5, 1998 – to establish permanent rates for the TO-98-115 UNEs, and stated an intent to conclude the investigation by July 1, 1998. *TO-98-115 Decision*, at p. 38.

<sup>25</sup> The Arbitration Advisory Staff filed a report regarding permanent UNE prices in June, 1998, and the Mo PSC held a hearing in September, 1998, but no decision was issued.

<sup>26</sup> Earlier this year – coincident with its announcement of support for SBC’s Missouri 271 Application – the Mo PSC established several dockets to address unresolved issues, including permanent pricing for the TO-98-115 UNEs (Mo PSC Case No. TO-2001-438), for xDSL line conditioning (Mo PSC Case No. TO-2001-439), and for line sharing and line splitting (Case No. TO-2001-440). The Mo PSC also has in process a docket (Mo PSC Case No. TT-2001-298) which will replace SWBT’s Missouri practice of providing collocation on a completely “individual case basis”, by establishing a collocation tariff with prices based on Missouri TELRIC. However, the hearing regarding TELRIC pricing for the TO-98-115 UNEs has not yet occurred (scheduled for December, 2001) and there is no decision date mandated by statute or regulation in that proceeding.

of the Act.<sup>27</sup> Section 251(c)(3) obligates incumbent LECs to provide non-discriminatory access to network elements on an unbundled basis at any technically feasible point and “on rates, terms and conditions that are just, reasonable and nondiscriminatory.”<sup>28</sup> In turn, Section 252(d)(1) requires that state commission determinations of rates for UNEs be based on the cost of providing the network element, be nondiscriminatory and may include a reasonable profit.<sup>29</sup> The Commission has construed this statutory mandate to require that UNE prices be set based on the total element long run incremental cost (TELRIC) of providing the network element.<sup>30</sup>

SBC may assert that the TO-98-115 UNE prices are based on TELRIC, but any such claim would merely reflect SBC’s unsubstantiated belief – SBC cannot represent to the Commission that a substantive, on-the-merits determination has been made at the state commission level that the TO-98-115 UNE prices are based on the Mo PSC’s application of TELRIC or any reasonably related costing methodology. No such determination has ever been made. The Missouri TO-98-115 UNE rates cited above are *SWBT proposed rates* that the Missouri PSC merely adopted on interim basis without any on-the-merits TELRIC determination -- as a matter of convenience -- nearly four years ago. In contrast, the Texas, Arkansas and

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<sup>27</sup> 47 U.S.C. § 271(B)(ii).

<sup>28</sup> 47 U.S.C. § 251(c)(3).

<sup>29</sup> 47 U.S.C. § 252(d)(1).

<sup>30</sup> *Local Competition First Report and Order*, 11 FCC Rcd at 15844-46, ¶¶ 674-679; C.F.R. §§ 51.501 *et seq.* The Commission’s authority to establish these pricing rules was upheld by the United States Supreme Court in January, 1999 in *American Tel & Tel Co. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999). Subsequently, the United States Court of Appeals for the Eighth Circuit held that certain aspects of the Commission’s TELRIC pricing rules were contrary to Congressional intent. *Iowa Utils. Bd. v. FCC*, 69 U.S.L.W. 3269 (U.S. Oct. 4, 2000) (No.00-511). However, the Eighth Circuit has stayed the issuance of its mandate pending review by the Supreme Court and, as a result, the Commission’s TELRIC rules remain operative, including for purposes of Applications under Section 271 of the Act.

Kansas UNE rates reflect on-the-merits TELRIC decision-making by the respective state commissions.<sup>31</sup> Logically, in order to defend these Missouri rates SBC must contend either that: (a) Missouri's cost factors relevant to these UNEs grossly exceed the corresponding cost factors in Texas, Arkansas and Kansas; or (b) The state commissions in Texas, Arkansas and Kansas uniformly understated TELRIC for these UNEs by huge margins. Neither contention is credible on its face, and SBC has offered no evidence to support either of those conclusions. As a result, there is absolutely no basis for the Commission to make the required finding that these UNE rates "fall within the reasonable range of TELRIC prices."<sup>32</sup>

Nor does the M2A (or the record created at the Mo PSC<sup>33</sup>) provide a basis to support the necessary finding that the state commission's orders demonstrate a consistent application of TELRIC principles.<sup>34</sup> The Mo PSC has failed to make on-the-merits determinations of TELRIC-based prices for a large number of UNEs, including but not limited to the TO-98-115 UNE rates. While NuVox applauds the Mo PSC's action earlier this year to establish new investigatory dockets and move forward with establishing permanent UNE prices based on Missouri TELRIC, for purposes of this Application the determinative factor is the current pricing of SBC's Missouri UNEs. Until near the end of the state proceeding which ultimately resulted in the Mo PSC's statement in support of this Application earlier this year, SBC clung to its initial position that its initially-proposed UNE rates (which it purported to be based on cost studies

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<sup>31</sup> The Arkansas PSC imported SBC's Kansas UNE rates, which the product of an extensive series of TELRIC proceedings conducted by the Kansas Corporation Commission.

<sup>32</sup> *SWBT Kansas/Oklahoma Order*, ¶ 55.

<sup>33</sup> Mo PSC Case No. TO-99-227.

<sup>34</sup> *SWBT Kansas/Oklahoma Order*, ¶ 55.

consistent with TELRIC principles, but which had never been substantively approved by the Mo PSC) be accepted for use in the M2A. Only when pressed by the Mo PSC late in that process did SBC agree to substitute Texas TELRIC prices for a number of its Missouri rates.<sup>35</sup> However, notwithstanding the fact that the TO-98-115 UNEs prices are, for some critical facilities, *several hundred percent higher* than the prices for the same UNEs in the T2A, the A2A (Arkansas) and the K2A (Kansas), SBC continues to refuse to reduce those rates as a condition of obtaining in-region, interLATA services authority for Missouri.

SBC had a golden opportunity to rectify these extreme price disparities when, after having withdraw its initial Missouri Application earlier this year, it came before the Missouri PSC and sought and received approval to modify the M2A to implement price reductions for a limited set of UNEs.<sup>36</sup> *However, in making those recent price adjustments SBC chose not to touch the rates for any of the TO-98-115 UNEs*, and the Missouri PSC declined to grant a request by NuVox to re-open the state-level investigation and require reductions in the TO-98-115 UNE

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<sup>35</sup> For example, at a January 31, 2001 hearing in Mo PSC Case No. TO-99-227, SWBT agreed to include Texas collocation prices in the M2A, pending a determination of Missouri TELRIC collocation prices in Mo PSC Case No. TT-2001-298. This concession came after months of competitive carriers urging this result. *See, Interim Order Regarding the Missouri Interconnection Agreement*, Mo PSC Case No. TO-99-227 at pp. 3-4 (issued February 13, 2001) (*Mo PSC Interim 271 Order*). Likewise, SWBT agreed – late in the process and reluctantly – to use Texas xDSL loop conditioning prices on an interim basis pending the determination of Missouri TELRIC prices in the pending investigation in Mo PSC Case No. TO-2001-439. *Mo PSC Interim 271 Order*, at p. 6. SWBT also agreed to use Texas prices on an interim basis for 95 UNEs for which rates were set on a non-cost basis in the first AT&T-SWBT Missouri arbitration. *Mo PSC Interim 271 Order*, pp. 5-6. As demonstrated above, the disparity between remaining TO-98-115 UNE rates and SBC's Texas and Arkansas/Kansas rates strongly suggests that SBC should adopt either the Texas or Arkansas/Kansas rates in Missouri, at least as an interim measure pending the result of the Mo PSC's UNE pricing docket.

<sup>36</sup> *Order Granting Motion to Accept Revised Missouri Interconnection Rates*, Mo PSC Case No. TO-99-227 (issued August 30, 2001)

prices as a condition of the PSC's continued support for SBC's Missouri In-Region, InterLATA bid.

SBC's failure to reduce prices for these UNEs as part of its this filing is particularly egregious in light of the concerns expressed by the United States Department of Justice ("DOJ") in the context of SBC's previous Missouri Application.<sup>37</sup> Just five months ago, in assessing these same price disparities, DOJ found, "The rates set in Docket No. 98-115 *exceed by a vast margin* the rates for similar UNEs set in states in which SBC has already obtained section 271 approval", confirming that Missouri monthly recurring charges exceed comparable Texas, Kansas and Oklahoma rates by two to six times and that Missouri NRCs exceed Texas, Kansas and Oklahoma rates by two to thirteen times.<sup>38</sup> DOJ also noted that, "It appears that the models used to generate the rates set in Docket No. 98-115 were the same as those SBC had originally proposed for use in Docket No. 97-40<sup>39</sup>, *and did not include the modifications that were required*

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<sup>37</sup> See, *Evaluation of the United States Department of Justice*, In the Matter of SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc., d/b/a Southwestern Bell Long Distance, for Provision of In-Region, InterLATA Services in Missouri, CC Docket No. 01-88 (May 9, 2001). ("DOJ Missouri Evaluation")

<sup>38</sup> *Id.*, at 12. Arkansas can now be added to the same category as Texas, Kansas and Oklahoma (since SBC has exported Kansas UNE rates to Arkansas), making these Missouri .UNE rates even less defensible than they were in SBC's first Missouri Application.

<sup>39</sup> In the Matter of AT&T Communications of the Southwest Inc.'s Petition for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Southwestern Bell Telephone Company and Petition of MCI Telecommunications Corporation, et al., for Arbitration and Mediation Under the Federal Telecommunications Act of 1996 of Unresolved Interconnection Issues with Southwestern Bell Telephone Company, Case Nos. TO-97-40 & TO-97-67 (decided, July 31, 1997). DOJ found a number of potential serious errors by the Missouri PSC in its Docket No. 97-40 TELRIC determinations in the areas of switch costs, loop costs and depreciation and common cost allocations. *DOJ Missouri Evaluation* at 14-18.

by Missouri staff in that docket.<sup>40</sup> That fact led DOJ to observe: “This blanket adoption of SBC’s proposed rates suggests that not only are the rates set in Docket No. 98-115 possibly tainted by the TELRIC errors [which DOJ found with respect to some of the Docket No. 97-40 UNEs]...*but that they may be even more significantly flawed.*”<sup>41</sup> DOJ also found that the Commission’s USF cost model could supply evidence of relative state cost differentials which even approach a level that would support the large disparities between SBC’s Missouri UNE rates and those of its other SWBT-region states.<sup>42</sup> In light of these concerns, DOJ urged the Commission to subject SBC’s Missouri UNE prices to its own independent scrutiny, rather than rely on the Missouri PSC’s price-setting decisions.<sup>43</sup> Because SBC has stubbornly refused to remedy these UNE price disparities on its own volition, independent scrutiny by the Commission continues to be required. But given the substantial cross-state price disparities and the lack of cost differential evidence, NuVox respectfully submits that such independent analysis can only conclude that SBC fails its Checklist Item 2 obligations in Missouri due to excessive Missouri UNE prices. The rationale offered by the Mo PSC in defense of its decision to allow continued use of the TO-98-115 prices in the M2A and to support SBC’s Application on that basis is both illogical and without any basis under applicable law. In announcing its opinion in February of this year that SBC meets all requirements under Section 271 of the Act, the Mo PSC found continued use of the TO-98-115 UNE prices acceptable in the M2A because these rates are contained in a number of SBC interconnection agreements with competitive carriers in Missouri

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<sup>40</sup> *DOJ Missouri Evaluation* at 18.

<sup>41</sup> *Id.*, at 19 (emphasis added).

<sup>42</sup> *Id.*, at 12-13.

<sup>43</sup>



and have been used by SBC and some of those carriers for a substantial period of time.<sup>44</sup> Of course, the fact that the TO-98-155 UNE prices are incorporated into many Missouri interconnection agreements is not surprising – because the Mo PSC sanctioned these rates in its December 1997 decision and has yet to issue an on-the-merits decision revising them to reflect Missouri TELRIC. Until the Mo PSC completes a valid UNE pricing docket, SBC has no incentive to offer lower prices for these UNEs in Missouri (and it, in fact, refuses to offer lower prices to requesting carriers). Likewise, the fact that some CLECs (including NuVox) have operated under these interconnection agreements merely reflects the fact that in order to offer service in Missouri these competitive carriers have been forced to accept the non-cost-based UNE prices that are available. To the extent prices for essential UNEs are excessive, they artificially inflate competitive carriers' costs of doing business. The fact that excessive UNE prices have failed to deter all competitive entry in Missouri does not establish the reasonableness of those prices, nor does it demonstrate SBC's compliance with the pricing provisions of the Act and the Commission's TELRIC pricing rules.<sup>45</sup>

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<sup>44</sup> See, *Mo PSC Interim 271 Order*, p. 5. The Mo PSC rejected NuVox's Application for Rehearing or, in the Alternative, Motion for Reconsideration and Modification of the Interim Order on this point without substantive discussion. See, also, *Order Denying Motions for Rehearing, Reconsideration and Clarification of Interim Order*, Mo PSC Case No. TO-99-227, at pp. 2-3 (issued March 15, 2001) (*Mo PSC Order Denying Rehearing*).

<sup>45</sup> In its after-the-fact *Order Regarding Recommendation on 271 Application Pursuant to the Telecommunications Act of 1996 and Approving the Missouri Interconnection Agreement (M2A)*, Mo PSC Case No. To-99-227 (issued March 15, 2001) (*Order Regarding Recommendation on 271 Application*), the Mo PSC suggests that the TO-98-115 rates are useable in the M2A because they are the product of an arbitration. However, unlike the first AT&T-SWBT Missouri arbitration (Case No. TO-97-40) – where some but not all UNE prices were set based on Missouri incremental costs and can at least be argued to be consistent with TELRIC principles – the UNE prices set in December, 1997 in Case No. TO-98-115 were not based on an on-the-merits

*continued ...*

Nor can SBC rely on the Commission's limited interim rate exception to justify use of the TO-98-115 UNE prices in the M2A. The Missouri situation does not present facts similar to those in the Commission's approval of Verizon's (then Bell Atlantic) New York Section 271 Application in which interim prices were sanctioned for what were then relatively new UNEs – xDSL loops – and in circumstances where the state commission had demonstrated a track record of setting other prices based on TELRIC.<sup>46</sup> The Missouri situation is also unlike that presented in SBC's Texas Application, where the Commission again sanctioned limited use of interim UNE rates.<sup>47</sup> In the *SWBT Texas Order*, the Commission found interim collocation prices satisfied Section 271's pricing requirements. But in those circumstances the Texas PUC had set the interim prices based on TELRIC principles, and did so in the context of having consistently pursued TELRIC pricing for Texas UNEs and interconnection.<sup>48</sup>

In Missouri, the facts are materially different: As noted above, the TO-98-115 UNE rates were set by the Mo PSC nearly four years ago; this is not a matter of a state commission dealing

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determination of TELRIC costs, notwithstanding the fact that this case was an arbitration. Regarding entrance facilities, multiplexing and other TO-98-115 UNEs noted herein, the Mo PSC merely accepted SWBT's proposed prices on an interim basis without any finding that the underlying SWBT cost studies were consistent with TELRIC – Missouri TELRIC-based prices were to be determined in the follow-up case which still remains to be decided. *See, TO-98-115 Decision*, pp. 21-22 (Issues 1b, 1c, 1j, and 7).

<sup>46</sup> *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-region, InterLATA Service in the State of New York*, Memorandum Opinion and Order, 15 FCC Rcd 3953, 4091, ¶ 259 (*Bell Atlantic New York Order*).

<sup>47</sup> *Application by SBC Communications, Inc., Southwestern Bell Telephone Company and Southwestern Bell Communications Services, Inc., d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-region, InterLATA Services in Texas*, Memorandum Opinion and Order, 15 FCC Rcd 18354, ¶¶ 82-90 (*SWBT Texas Order*).

<sup>48</sup> *Id.*

contemporaneously with relatively new UNEs and setting interim prices temporarily until it can “sync-up” its cost investigation and the determination of permanent TELRIC prices with a newly presented set of additional UNEs. There is no factual record to support a finding that the TO-98-115 UNE prices are set based on TELRIC principles. As noted above, the Mo PSC is moving forward to establish a fresh factual record and to make on-the-merits pricing determinations for all UNEs which have previously been set on a basis other than Missouri TELRIC, including the TO-98-115 UNEs. NuVox is participating in those Missouri dockets and fully supports the Mo PSC’s efforts to resolve these pricing issues. But those current efforts, and the prospect of Missouri TELRIC-based prices for these UNEs sometime in the future, does not cure the Checklist Item 2 deficiency caused by SBC’s insistence on relying on non-cost based rates for a current Section 271 Application for Missouri.

The remedy for this deficiency is straightforward; it is the remedy that NuVox consistently advocated during the state commission proceedings:<sup>49</sup> the Commission should require SBC to substitute its T2A prices for those it has proposed in the M2A for the TO-98-115 UNEs.<sup>50</sup> This substitution would apply on an interim basis until such time as the Mo PSC makes an on-the-merits determination of Missouri TELRIC prices for these UNEs in its current investigation. When SBC submits a revised Application that substitutes these Texas prices in the M2A, this Checklist Item 2 deficiency will be cured.

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<sup>49</sup> During the course of the state proceedings, NuVox’s position has been that Texas prices should be used in the M2A on an interim basis for all UNEs for which the Mo PSC has yet to make on-the-merits determinations based on Missouri TELRIC.

<sup>50</sup> Substitution of the corresponding Arkansas/Kansas UNE rates also provides a reasonable alternative, particularly in light of SBC’s action to export the Kansas UNE rates to Arkansas in order to obtain support of the Arkansas PSC for the pending Arkansas Section 271 Application.

**CONCLUSION**

SBC's Application for Section 271 authorization for Missouri should be denied at this time for the reasons explained above. SBC should be directed to substitute Texas, or Arkansas/Kansas prices for the Missouri TO-98-115 UNE prices on an interim basis to cure the Checklist Item 2 deficiency.

Respectfully submitted,

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Its Attorneys

Dated: September 10, 2001

## CERTIFICATE OF SERVICE

I, Margaret Lucero, hereby certify that a true and correct copy of the foregoing  
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